



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 660**

**[Docket No: 220627-0142]**

**RTID 0648-XB877**

### **Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications; 2022-2023 Annual Specifications and Management Measures for Pacific Sardine**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing annual harvest specifications and management measures for the northern subpopulation of Pacific sardine (hereafter, Pacific sardine), for the fishing year, which runs from July 1, 2022, through June 30, 2023. This final rule will prohibit most directed commercial fishing for Pacific sardine off the coasts of Washington, Oregon, and California. Pacific sardine harvest will be allowed only in the live bait fishery, minor directed fisheries, as incidental catch in other fisheries, or as authorized under exempted fishing permits. The incidental harvest of Pacific sardine will be limited to 20 percent by weight of all fish per trip when caught with other stocks managed under the Coastal Pelagic Species Fishery Management Plan, or up to 2 metric tons per trip when caught with non-Coastal Pelagic Species stocks. The annual catch limit for the 2022-2023 Pacific sardine fishing year is 4,274 metric tons. This final rule is intended to conserve and manage the Pacific sardine stock off the U.S. West Coast.

**DATES:** Effective June 30, 2022.

**FOR FURTHER INFORMATION CONTACT:** Taylor Debevec, West Coast Region, NMFS, (562) 619-2052, *Taylor.Debevec@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone (EEZ) off the Pacific coast (California, Oregon, and Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The FMP and its implementing regulations require NMFS to set annual catch levels for the Pacific sardine fishery based on the annual specification framework and control rules in the FMP. These control rules include the harvest guideline (HG) control rule, which, in conjunction with the overfishing limit (OFL) and acceptable biological catch (ABC) rules in the FMP, are used to manage harvest levels for Pacific sardine, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.*

This final rule implements the annual catch levels, reference points, and management measures for the 2022-2023 fishing year. The final rule adopts, without changes, the catch levels and restrictions that NMFS proposed in the rule published on May 9, 2022. The proposed rule for this action included additional background on the specifications and details of how the Pacific Fishery Management Council (Council) derived its recommended specifications for Pacific sardine. Those details are not repeated here. For additional information on this action, please refer to the proposed rule (87 FR 27557).

This final rule implements an OFL of 5,506 metric tons (mt) and an ABC/annual catch limit (ACL) of 4,274 mt, based on CPS FMP control rules and a biomass estimate of Pacific sardine of 27,369 mt. This biomass estimate is from the 2022 update stock assessment, which was identified by the Council's Scientific and Statistical Committee to represent the best scientific information available for management of Pacific sardine. Per the CPS FMP, because the estimated biomass is less than 150,000 mt (i.e., the Rebuilding

target and CUTOFF in the harvest guideline control rule), the primary directed fishery is set to 0 mt, meaning there is no primary directed fishery for Pacific sardine. This is the eighth consecutive year the primary directed fishery has been closed. Because the estimated biomass is below the minimum stock size threshold (50,000 mt) the FMP requires that incidental catch of Pacific sardine in other CPS fisheries be limited to an incidental allowance of no more than 20 percent by weight. Although these management measures, triggered by the FMP, are expected to keep catch far below the ACL as they have done in recent history, this rule also implements an annual catch target (ACT) of 3,800 mt and implements management measures intended to ensure harvest opportunity throughout the year.

A summary of the 2022-2023 fishing year specifications can be found in Table 1, and management measures are summarized in the list below Table 1.

**Table 1 – Harvest Specifications for the 2022-2023 Sardine Fishing Year in Metric Tons (mt)**

Biomass Estimate	OFL	ABC	HG	ACL	ACT
27,369	5,506	4,274	0	4,274	3,800

Following are the management measures for commercial sardine harvest during the 2022-2023 fishing year:

- 1) If landings in the live bait fishery reach 1,800 mt of Pacific sardine, then a 1 mt per-trip limit of sardine would apply to the live bait fishery.
- 2) An incidental per-landing limit of 20 percent (by weight) of Pacific sardine applies to other CPS primary directed fisheries (*e.g.*, Pacific mackerel).
- 3) If the ACT of 3,800 mt is attained, then a 1-mt per-trip limit of Pacific sardine landings would apply to all CPS fisheries (*i.e.*, 1) and 2) would no longer apply).
- 4) An incidental per-landing allowance of 2 mt of Pacific sardine would apply to non-CPS fisheries until the ACL is reached.

All sources of catch, including any exempted fishing permit (EFP) set-asides, the live bait fishery, and other minimal sources of harvest, such as incidental catch in CPS and non-CPS fisheries and minor directed fishing, will be accounted for against the ACT and ACL. At the April 2022 Council meeting, the Council approved 830 mt of the ACL for three EFP proposals to support stock assessments for Pacific sardine. If the effective date of this final rule is after July 1, 2022, any Pacific sardine harvested between July 1, 2022, and the effective date will count toward the 2022-2023 ACT.

The NMFS West Coast Regional Administrator will publish notification in the **Federal Register** to announce when catch reaches the incidental limits as well as any resulting changes to allowable incidental catch percentages. Additionally, to ensure the regulated community is informed of any closure, NMFS will make announcements through other means available, including emails to fishermen, processors, and state fishery management agencies.

### **Comments and Responses**

On May 9, 2022, NMFS published a proposed rule for this action and solicited public comments through May 24, 2022 (87 FR 27557). NMFS received two public comments -- one from the industry group California Wetfish Producers Association (Association) and one from the environmental group Oceana. The Association supported the proposed rule in its entirety. After considering the public comments, NMFS made no changes from the proposed rule. NMFS summarizes and responds to the comment from Oceana below.

*Comment:* Oceana supported the prohibition on directed fishing for Pacific sardine, but recommended that NMFS: use a different E (maximum sustained yield (MSY) - fishing rate) value to calculate the OFL and ABC; use survey results without the distribution factor instead of the model-based stock assessment to set limits, or incorporate additional precautionary buffers if using the assessment; set the ACL no

higher than 800 mt; limit the incidental catch allowance to no more than 10 percent; and reduce allowable catch levels for the live bait fishery. In addition to those recommendations on the proposed rule, Oceana also recommended what they state are necessary reforms to various aspects of Pacific sardine management. Changes to the management framework of Pacific sardine and to the Pacific sardine harvest control rules are set in the CPS FMP and are beyond the scope of this rulemaking. These include Oceana's recommendations to: revise the  $E_{MSY}$  formula; change the fishing season dates to January 1-December 31 to align with using survey data estimates; change the distribution factor; increase the cutoff factor; and coordinate international management of the fishery. NMFS will consider these recommendations as appropriate in future related discussions on sardine management. But because they are not within the scope of this action, they will not be addressed with a response here.

*Response:*

As it relates to the comment that NMFS should use an  $E_{MSY}$  of 5 percent to calculate the OFL and ABC, NMFS has determined that the OFL and ABC being implemented through this action will prevent overfishing and are supported by the best scientific information available. Oceana claimed that the  $E_{MSY}$  fishing rate and distribution factor NMFS used "are overestimated, resulting in an OFL that does not prevent overfishing;" however, we note that overfishing has never occurred in this fishery. Additionally, the reference points proposed for the 2022-2023 fishing year were recommended by the Council's SSC and determined by them to represent the best available science and are based on the formulas in the CPS FMP, including the formula adopted for calculating  $E_{MSY}$ . Regarding recent Council discussions related to  $E_{MSY}$ , NMFS notes that the Council's SSC— the scientific advisory body that is responsible for recommending changes to  $E_{MSY}$  — can (as it has done in the past) recommend changes to

$E_{MSY}$  at any time if the best available science warrants such a revision, and it has not determined that a change is necessary at this time.

NMFS is aware of the 2019 scientific publication referenced by Oceana in their comment letter and of ongoing Council discussions related to  $E_{MSY}$ . NMFS is committed to participating in discussions about new science and whether that science justifies a change to how  $E_{MSY}$  is calculated for management purposes. Regarding the 2019 paper mentioned by Oceana that was authored by researchers at the SWFSC, NMFS notes that research related to the appropriate temperature index to inform  $E_{MSY}$  is ongoing. NMFS has not yet determined whether, based on that paper, a change in how  $E_{MSY}$  is calculated is necessary for management purposes. NMFS will continue to examine whether this new publication warrants a change in management; however, as previously stated, NMFS has determined that the reference points set through this action are based on the best scientific information available.

As it relates to the comment that NMFS base limits on acoustic trawl survey results (without the distribution factor) instead of the model-based stock assessment, this is out of the scope of this action; additionally this methodology has not been scientifically analyzed and therefore cannot be considered the best scientific information available at this time. NMFS disagrees with Oceana's alternative suggestion (in the event the model is still used instead of the survey data, per Oceana's initial suggestion) to increase the buffer between the OFL and ABC to account for uncertainty in the 2022 stock assessment update. NMFS disagrees with this because the stock assessment was endorsed by the Council's SSC as the best scientific information available for management, and NMFS determined that it represents the best available science for management as well. Oceana points to uncertainties in the stock assessment, but the ABC being implemented through this action is from the Council's SSC, which is responsible for making ABC recommendations to the Council, and which already incorporates a buffer to account for

uncertainty. The buffer between OFL and ABC for this year's fishing season is appropriately smaller than the buffer between OFL and ABC for last year's fishing season because the SSC determined that this year's assessment is less uncertain than last year's assessment due to the addition of new data. NMFS also notes that, contrary to Oceana's assertions, there have been no "indications of overfishing in several previous years" that would warrant a more precautionary approach to setting the ABC. NMFS has therefore determined that it is not necessary to further reduce the ABC from the OFL to prevent overfishing.

NMFS disagrees with Oceana's recommendation that the ACL should be no higher than 800 mt. Further reductions in catch levels beyond those recommended by the Council are unnecessary at this time to rebuild the stock or for other reasons. The OFL/ABC/ACL were all calculated in alignment with the rebuilding plan. The ACL should be viewed in the context of the OFL of 5,506 mt and the ABC of 4,274 mt, which takes into account scientific uncertainty surrounding the OFL. The reference points being implemented through this action were recommended by the Council based on the control rules in the FMP and were endorsed by the Council's SSC as the best scientific information available for setting the 2022-2023 harvest specifications for Pacific sardine. In addition, the management measures adopted by the Council, including an ACT that was set even lower than the ACL (3,800 mt), are more than adequate to ensure catch does not exceed the ACL/ABC and OFL. The reference points implemented through this action should also be viewed in the context of the non-discretionary harvest restrictions already in place, pursuant to the CPS FMP, which generally restrict the fishery from catching the full ACL. These non-discretionary restrictions include the continued closure of the primary directed fishery (*i.e.*, the largest fishery that takes the majority of Pacific sardine catch) and restrictions on incidental harvest of Pacific sardine in other CPS fisheries (which are currently less than half of typical incidental limits). The Council

considered the overfished status of Pacific sardine, as well as the uncertainty around the 2022 update assessment, and incorporated precautionary measures in their recommendations to NMFS to account for those factors. Those precautionary measures included: (1) deeming the assessment Tier 2; (2) using a  $P^*$  value of 0.4; (3) reducing the ACT from the ACL; (4) reducing the EFP allowance from the requested amount; and (5) incorporating accountability measures. These accountability measures include: (1) limiting live bait landings to 1 mt per landing once 1,800 mt of sardine is attained; (2) imposing a per-trip limit of 1 mt of sardine in all CPS fisheries once the ACT is attained; and (3) implementing an incidental per-landing allowance of 2 mt in non-CPS fisheries until the ACL is reached.

As it relates to the comment that NMFS set the incidental catch allowance at 10 percent, NMFS notes that all harvest, regardless of how it is taken or at what level (*i.e.* 10 percent or 20 percent), is accounted for under the OFL/ABC/ACL/ACT for this action, and these levels have been determined to prevent overfishing of Pacific sardine and support the rebuilding of the stock. Additionally, reducing the incidental catch allowance is not necessary to ensure these reference points are not exceeded, therefore NMFS does not see a justification to restrict this sector further than the low catch allowance already in place.

Lastly, with regard to reducing allowable catch levels for the live bait fishery, Oceana does not outline to what level or why restricting this sector beyond the ways this sector is already restricted is necessary. This action implements a measure providing that, if the live bait fishery attains 1,800 mt, there will be a 1-mt trip limit on the live bait fishery; this measure provides for another precautionary step to ensure the ACL is not exceeded.

## **Classification**



Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the CPS FMP, other provisions of the MSA, and other applicable law.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in the date of effectiveness of these final harvest specifications for the 2022-2023 Pacific sardine fishing season. In accordance with the FMP, this rule was recommended by the Council at its meeting in April 2022. The contents of this rule are based on the best scientific information available on the population status of Pacific sardine, which became available at that April 2022 meeting. Making these final specifications effective on July 1, the first day of the fishing year, is necessary for the conservation and management of the Pacific sardine resource because last year's restrictions on harvest are not effective after June 30. The FMP requires a prohibition on primary directed fishing for Pacific sardine for the 2022-2023 fishing year because the sardine biomass has dropped below the CUTOFF. The purpose of the CUTOFF in the FMP, and for prohibiting a primary directed fishery when the biomass drops below this level, is to protect the stock when biomass is low and provide a buffer of spawning stock that is protected from fishing and can contribute to rebuilding the stock. A delay of a full 30 days in the date of effectiveness for this rule would result in the re-opening of the primary directed commercial fishery on July 1.

Delaying the effective date of this rule beyond July 1 would be contrary to the public interest because it would jeopardize the sustainability of the Pacific sardine stock. Furthermore, most affected fishermen have already been operating under a prohibition of the primary directed fishery for years, and are aware that the Council recommended that primary directed commercial fishing be prohibited again for the 2022-2023 fishing year, and are fully prepared to comply with the prohibition.

This final rule is exempt from review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities for the purposes of the Regulatory Flexibility Act. The factual basis for the certification was published in the proposed rule (87 FR 27557, May 9, 2022) and is not repeated here. As a result, a final regulatory flexibility analysis was not required and none was prepared.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with the Council's tribal representative, who has agreed with the provisions that apply to tribal vessels.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act. There are no relevant Federal rules that may duplicate, overlap, or conflict with the proposed action.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: June 27, 2022.

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Samuel D. Rauch, III

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[FR Doc. 2022-14122 Filed: 6/30/2022 8:45 am; Publication Date: 7/1/2022]